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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 884

TRU-LINE METAL PRODUCTS COMPANY
and
TRU-LINE SCREW PRODUCTS, INCORPORATED,
Petitioners,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable, the Justices of the Supreme Court of the United States:

Tru-Line Metal Products Company and Tru-Line Screw Products, Incorporated, respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review a decree for enforcement of an order of the National Labor Relations Board.

In support of this petition the Petitioners respectfully show as follows:

1. Reference to opinion of lower court.

The only opinion of a lower court in this matter, and the one on which the decree here sought to be reviewed is based, is that filed by the court of appeals for the sixth circuit on November 26, 1963, in Docket Number 15,194, reported at 324 F. 2d 614 (C.A. 6), which is appended to this petition as Appendix A.

2. Statement with respect to jurisdiction.

a. The decree which Petitioners seek to have reviewed was entered on the Twenty-sixth day of November, 1963.

b. On February 24, 1964 Justice Stewart granted extension to file petition to March 5, 1964.

c. The statutory grounds upon which Petitioners invoke the jurisdiction of this Court to review the decree in question are those contained in Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, as amended by 73 Stat. 519), being 29 U.S.C., Secs. 151 *et seq.*, as amended.

3. Statement of questions presented for review.

a. Whether there is substantial evidence on the record considered as a whole to support the findings of the Board that Petitioners violated Sections 8(a)(1) and (3) of the National Labor Relations Act by discriminatorily laying off employees for union activities, for making coercive statements, and for engaging in unlawful surveillance of union activities.

b. Whether the opinion of the court below conflicts with the position of courts of appeals in other circuits with respect to what constitutes a coercive statement and what constitutes unlawful surveillance under the National Labor Relations Act.

c. Whether this Court may deem a review of the decree in question to be appropriate as an opportunity to reappraise the standard applicable in determining what constitutes substantial evidence under the National Labor Relations Act in light of the experience gained and the changes in the economic factors affecting labor-management relations that have occurred since the act was first passed.

4. Statutory provisions involved.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

5. Statement of the case.

Petitioners were charged with violating Sections 8(a)(1) and (3) of the National Labor Relations Act in a complaint issued against them* by the National Labor Relations Board on November 17, 1961.

The complaint alleged that two of Petitioners' employees had been discriminatorily laid off due to union activities. These two testified at the hearing that in the latter part of August, 1961, they obtained union authorization cards from another of Petitioners' employees and between them contacted most of Petitioners' employees, approximately 40 in number, for the purpose of having the cards signed and bringing a union into the shop, but that such contacts were made outside of regular working hours or away from the working area, as, *e.g.*, in the ladies powder room; that a short time thereafter they were laid off; and that the

*Throughout the proceedings involved here Petitioners have been held to be and treated as a single employing unit and a joint respondent. Deeming this to be immaterial to the outcome, Petitioners have not challenged such holdings and are willing to accept them for the purposes of the proceedings in this Court.

reason given them for the lay-off was lack of work, although the workload in the shop had not slackened.

Petitioners offered testimony that the management had no knowledge that the two employees laid off were leaders or had any part in union organizing activities in the shop; that one of them was frequently asking for raises on threat of quitting and that the other had lost time and had refused to accept a change of shifts due to domestic difficulties; that the shop operated satisfactorily without them and without replacing them after they were laid off; and that the employee who had originally brought the union cards into the shop had told Petitioners' president of being the one who started the trouble about the union in the shop, but that this employee was not disciplined in any way.

The complaint further alleged that one of Petitioners' supervisors had made coercive statements to employees. It was testified that some time during the period in question the supervisor told a group of employees in a conversation during the lunch hour that "If the union gets in * * * we'll all be without a job."

The complaint also alleged the commission by Petitioners of an act of unlawful surveillance. It was testified that about a week after the lay-offs in question the agent of the local union which was interested in organizing Petitioners' employees arranged to meet the laid-off employees near the shop for the purpose of soliciting Petitioners' employees in behalf of the union during the change of shifts; that while he was parked and waiting he observed Petitioners' president drive out of a nearby driveway toward him; that the union agent then started up and drove away, only to be followed for several blocks by Petitioners' president; and that the planned solicitation of employees was abandoned.

Petitioners' president testified in this regard that he had frequent occasion to make calls in the neighborhood on other small shops in the area; that the actions of the union agent had aroused his curiosity, if not suspicion; and that once he had satisfied himself that there was no trouble in the making, he went on about his business.

The Trial Examiner in his Intermediate Report, attached to the Decision and Order of the Board appended to this petition as Appendix B, recommended dismissal of the complaint in its entirety, stating that he did not find sufficient substantial evidence to support the complaint and that he gave credibility to Petitioners' witnesses.

The Board, however, one member dissenting, overruled the Trial Examiner, stating that it accepted his findings of fact but not the inferences drawn therefrom, sustained the complaint in its entirety, and entered its order accordingly.

Upon subsequent petition of the Board, the court of appeals entered a decree enforcing the order of the Board in its entirety.

6. Argument in support of petition.

Petitioners' contentions in support of the granting of this petition for writ of certiorari are as follows:

a. There is not enough substantial evidence on the record considered as a whole to support the findings of the Board.

Petitioners contend that this is one of those rare cases mentioned by this Court in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, where the standard was misapprehended or grossly misapplied because:

(1) The Board accepted the findings of fact of the Trial Examiner, yet overruled his conclusions; but many of these findings, *e.g.*, whether Petitioners had knowledge of the organizing activities of the laid off employees or whether Petitioners' president came upon the union official by mere chance and acted in pursuance of an aroused curiosity, necessarily depended on the Trial Examiner's findings on the credibility of the witnesses;

(2) Thus in effect the Board either failed to give proper weight to Petitioners' evidence or disregarded it and drew its own inferences from the evidence against Petitioners standing alone; and

(3) The Board has no right under the decisions of this Court to do this, particularly in a case where, as here, the ease with which differing inferences may be drawn is illustrated by the disagreement between the Board and its Trial Examiner and between members of the Board itself and can be further illustrated by page upon page of argument on the facts and the motives of the people involved.

b. The opinion of the court below conflicts with the position of courts of appeals in other circuits with respect to the nature of coercive statements and with respect to the nature of surveillance:

(1) Courts of appeals in the third, fifth, and ninth circuits have held that statements by management to employees that a plant would have to be shut down if the union came in, where there was no showing of any affirmative action to bring about such result, did not constitute unlawful coercion but were treated as opinion or predictions and a protected part of the

employer's freedom of speech; *N.L.R.B. v. Morris Fishbein & Sons, Inc.*, 278 F. 2d 792 (C.A. 3); *N.L.R.B. v. Armstrong Tire & Rubber Co.*, 228 F. 2d 159 (C.A. 5); *N.L.R.B. v. West Coast Casket Co.*, 205 F. 2d 902 (C.A. 9).

(2) The court of appeals for the eighth circuit has held that an accidental isolated observance of union activity where there was no showing of planned espionage or any indication of detriment to or restraint of employees did not constitute unlawful surveillance; *N.L.R.B. v. Falls City Creamery Company*, 207 F. 2d 820 (C.A. 8).

(3) Petitioners contend that these matters are of great importance because the subtraction of the charges of coercion and surveillance from the weight of the evidence against them could readily lead, in a close case like this, to an entirely different finding on the question of substantial evidence.

c. This Court may deem a review of this case to be an appropriate occasion for reappraising the standard applicable to determining what constitutes substantial evidence in cases of this kind.

(1) From the time of its first consideration of the National Labor Relations Act this Court has taken cognizance of the value of experience in dealing with labor-management relations and has taken judicial notice of economic conditions affecting those relations; *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1.

(2) Petitioner contends that a standard which was applied to safeguard the rights of workers in an era when industrial unions were small, poorly organized, and could contact prospective members only

with great difficulty may not be the proper standard to apply now, more than a generation later, when industrial unions are firmly established in the economic community and when industry is in the midst of what has been termed a second industrial revolution in the automation of its facilities, which has already presented, as in the instance of the railroad firemen, problems of grave national concern due to displacement of employees.

(3) Petitioners further contend that their case is good example of many in which the application of this standard has led to much confusion, much needless litigation, and all too often to unsatisfactory results, and that it affords a good opportunity for a much-needed review of this standard in the light of the conditions prevailing to-day.

Wherefore, Petitioners respectfully pray that this petition may be granted and that this Court issue its writ of certiorari to the court of appeals for the sixth circuit to review the decree in question.

TRU-LINE METAL PRODUCTS COMPANY and
TRU-LINE SCREW PRODUCTS, INCORPORATED,

By ROBERT M. MYERS,
Attorney at Law,
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Dated at Detroit, Michigan,
January 24, 1964.

APPENDIX A

OPINION OF COURT OF APPEALS

Decided November 26, 1963.

Before: CECIL, Chief Judge, and O'SULLIVAN and PHILLIPS, Circuit Judges.

PHILLIPS, Circuit Judge. The National Labor Relations Board has filed a petition seeking enforcement of an order directing respondent to cease and desist from certain unfair labor practices, to reinstate two employees, and to post the customary notice. It is not disputed that the two respondent companies constitute a single employer within the meaning of the Act.

The Board overruled the trial examiner, who had dismissed the complaint on the basis that there were no violations of the Act. The Board did not disagree with the findings of fact, but rather drew different inferences from the facts as found by the examiner. This of course the Board was free to do. *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 236 F. 2d 898, 907 (C.A. 6). When the trial examiner and the Board disagree, this Court will examine the evidence with greater care. *Burke Golf Equipment Co. v. N.L.R.B.*, 284 F. 2d 943, 944 (C.A. 6); *Amalgamated Meat Cutters v. N.L.R.B.*, 276 F. 2d 34, 36 (C.A. 1). The standard, however, continues to be whether substantial evidence supports the findings of the Board. *Universal Camera Corp. v. N.L.R.B.*, 340 U. S. 474, 496; *Amalgamated Meat Cutters v. N.L.R.B., supra.*

The Board found that respondent violated §8(a)(3) and (1), 29 U. S. C. §158(a) (3) and (1), by discriminatorily discharging two employees for their union activities. It appears that these two employees were released without notice a day or two after they began their organizational

efforts. There is no direct evidence that respondent knew of the activities of these particular employees, and the president denied having any such knowledge. He did know, however, that there was some union activity in the plant, and it is clearly established that there was a close conjunction in time between the union activity and the discharge of these two employees. *N.L.R.B. v. Wayne W. Wilson Co.*, 311 F. 2d 1 (C.A. 6).

The Board found that these two employees were the chief protagonists of the union; that their activities among their fellow employees were extensive and unconcealed; that the plant was small and had only thirty-six employees, with about thirteen on the day shift constituing the largest group working at any one time; that the two discharged persons were among respondents' most highly qualified employees; that one of the discharged employees had the greatest seniority, was the highest paid, and was the most versatile of all the female employees; that the other discharged employee had greater seniority than many others and had been granted two recent increases in wages; that the two employees were discharged suddenly, without any previous warning or reprimand for unsatisfactory work or conduct; and that, while respondent undertook to justify the discharges upon the ground of lack of work, the workload in fact had increased about that time, requiring more overtime work.

We find that the Board was justified in concluding from these circumstances that these two employees were discharged discriminatorily because of their activities in support of the union. It is settled law that the credibility of witnesses and reasonable inferences to be drawn from the evidence are matters for determination by the Board. *United Fireworks Mfg. Co. v. N.L.R.B.*, 252 F. 2d 428, 430 (C.A. 6).

The Board further found that on one occasion respondent's president, while leaving the plant, saw a union representative and followed him in his car. When the union official stopped and tried to meet with employees, the presi-

dent drove past the group a number of times. Respondent contends that these actions were motivated by a desire to satisfy an aroused curiosity, but we cannot say that the Board was incorrect in concluding that these facts constituted surveillance of union activity in violation of §8(a)(1), 29 U. S. C. §158(a)(1). See *N.L.R.B. v. Hunter Engineering Co.*, 215 F. 2d 916, 918 (C.A. 8).

The Board also found a violation of §8(a)(1) in a statement by a supervisor to an employee that "[I]f the Union gets in the company has to fold up." Such a remark must be viewed in the context of a union campaign. As this Court has said: "[S]tatements on the part of management to employees that it might be necessary to close the plant, made during a period when unionization of its employees was sought to be effected, must be regarded as coercive, notwithstanding sincere belief that such result would follow." *United Fireworks Mfg. Co. v. N.L.R.B.*, 252 F. 2d 428, 430 (C.A. 6). Thus the Board could reasonably find that the statement in the instant case was coercive and a violation of §8(a)(1), 29 U. S. C. §158(a)(1).

We conclude that the findings of the Board are supported by substantial evidence on the record and that the order is appropriate in light of these findings.

A decree will be entered enforcing the order of the Board.

APPENDIX B

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

On May 28, 1962, Trial Examiner Wellington A. Gillis issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be disinissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the General Counsel's exceptions and brief, and the entire record in this proceeding, and finds merit in some of the General Counsel's exceptions. Accordingly, we adopt the findings and conclusions of the Trial Examiner only insofar as they are consistent with our decision herein.

1. Tru-Line Metal and Tru-Line Screw, the joint Respondent, are located in the same plant, and occupy some additional space across the street in the plant of Bayley Products, an unaffiliated company. Tru-Line Metal has a total of 24 female and five male employees working on a three-shift schedule, and Tru-Line Screw has seven male employees working on a two-shift schedule.

During the last week in August 1961, the Union, Local 408, International Union, United Automobile, Aircraft and

Agricultural Implement Workers of America, AFL-CIO, began an organizing campaign among the Respondent's employees. Reed, a Tru-Line Screw employee, secured some authorization cards from Matti Miller, the union shop steward at Bayley Products, whose employees were represented by the Union. Reed signed a card, and gave the remaining cards to Clark, who gave some of them to Hall. Hall solicited the female employees, and Clark the male employees, and between them they talked to practically all the employees about the Union.

Reed informed Finlayson, president of the Respondent, that he had signed a card for the Union. In a later conversation, on September 6, Reed informed Finlayson that he "was the one who started the trouble in the shop about a union," and complained that he was working too hard, that he was dissatisfied with his rate of pay, and that he did not get a vacation that year. Finlayson replied that he could not at that time grant Reed a wage increase, but that Reed could take a vacation the following week. Reed was thereafter given an extra part-time job at a company in which an official of the Respondent had a substantial interest, and, after the layoff of Clark on September 7, allegedly for lack of work, as discussed below, Reed, was assigned to do Clark's work, although he had less seniority and skill than Clark.

On September 7, at about 3:30 in the afternoon, Finlayson told Clark that he was being laid off "due to lack of work." At about the same time, supervisor Wolcott told Hall that she was being laid off "because of lack of work." According to Hall's uncontradicted testimony, Wolcott also remarked that he had asked her at one time to go on the afternoon shift and she had refused, but, when she asked Wolcott why "he didn't put me on afternoons * * * he walked away and didn't act like he wanted to talk about it." Wolcott had asked Hall about nine months to a year prior to her layoff to change shifts, but, when she told Wolcott and Finlayson she could not change because of family problems, Finlayson said that he did want to cause her any trouble at home, and she was never again asked to change shifts.

The Respondent offered no explanation of why Clark and Hall were the employees selected for layoff. Hall had the greatest seniority, was the highest paid, and was the most versatile of all the female employees. Clark had greater seniority than many other employees. When he told Finlayson early in 1960 that he was looking for another job, he had been given a ten-cent hourly wage increase, and he was given another ten-cent increase early in 1961. Neither Clark nor Hall had been warned or reprimanded for unsatisfactory work or conduct.

The Respondent did not show that there was a decline in the workload which necessitated the layoffs. On the contrary, the workload had increased at about that time, requiring more overtime work than before the layoffs. In addition, an employee was hired in November 1961 and another in January 1962. Moreover, during prior slack periods, the Respondent had put in effect a share-the-work program whereby employees worked reduced hours but no one was laid off. The Respondent offered no explanation for the change in this policy when Clark and Hall were laid off.

The Trial Examiner found many of the circumstances surrounding the layoffs highly suspicious, and pointed particularly to the factors that, "(a) the Respondent was aware of union activity among its employees; (b) apart from Reed, employees Clark and Hall were the leaders in the union movement, and between them apparently at one time or another, most of the employees were contacted; (c) both Clark and Hall were separated simultaneously not too long after the union activity commenced, and without advance notice; (d) Hall was capable of performing most of the jobs in the plant and neither she nor Clark were at the bottom of their respective seniority lists; (e) there had been no plant layoffs for a long time and; according to one employee, in the past, slack periods prompted the Respondent in establishing a "short week" rather than necessitating the reduction of personnel; and (f) testimony by General Counsel witnesses indicated that there appeared little or no change in Respondent's overall work load after the September 7 layoffs.

Despite these suspicious circumstances, the Trial Examiner found that Clark and Hall were not discriminatorily laid off, principally because he found no evidence establishing the Respondent's knowledge of the organizing activities of Clark and Hall. We note, however, that Reed, just before the layoffs, had two conversations with Finlayson in which he volunteered information about his activity in behalf of the Union, following which he was given a vacation, an additional part-time job, and, after Clark was laid off, Clark's job. We are of the opinion that the circumstances cast considerable doubt on Reed's denial that he informed Finlayson about the union activities in general, including the leading parts played by Clark and Hall. Furthermore, Kondzer, a supervisor, admitted that Clark, sometime before the layoff, had remarked to him, "once we get a union here things will be different." We note also that the Respondent's operation was relatively small, with about 13 employees on the day shift constituting the largest group working at any one time. In addition, supervisors worked on machines with employees or in close proximity to them. Finally, as the Trial Examiner found, Clark and Hall were the leaders in the union movement and, between them, had solicited most of the employees to join the Union.

As indicated, despite the above evidence the Trial Examiner concluded that the General Counsel had not established that Respondent was aware of the organizing activities of Clark and Hall at the time of the layoffs. We do not agree. Proof of knowledge of union activities may be established by circumstantial as well as by direct evidence. We believe that a finding of such knowledge is warranted on the basis of all the evidence in the record.[1] Particularly pertinent are the facts that Clark and Hall were the protagonists for the Union; their activities were extensive and were not carried on in a clandestine manner; the plant is a small one and has few employees; on the day before the layoffs employee Reed told President Finlayson that he had brought the Union into the shop thus definitely making Finlayson

[1] Wiese Plow Welding Co., Inc., 123 NLRB 616.

aware of union activities; on the day following the receipt of this information Finlayson precipitately laid off the two union leaders; and Respondent has offered no reasonable explanation, as the Trial Examiner himself found, for the layoffs.[2] The above evidence raises more than a suspicion of illegal motivation in the layoffs. Indeed the only plausible inference on this state of the record is that Respondent did learn of the union activities of Clark and Hall and laid them off for this reason. We so find. We accordingly find that by the layoffs Respondent discriminated against Clark and Hall in violation of Section 8(a)(3) and (1) of the Act.

2. On September 13, a few days after the layoffs, Clark and Hall had arranged to meet with Miller, the shop steward at Bayley Products, and Bocks, the Union representative, for the purpose of soliciting employees of the Respondent to join the Union. They were to meet on a corner near the plant after the day shift had ended and while the afternoon shift was going to work. Bocks arrived first. When he observed Finlayson coming out of the plant in his car, Bocks drove away, but Finlayson followed him for several blocks. Later Finlayson again followed Bocks while Clark and Hall were in Bocks' automobile, and, when they parked, Finlayson drove by several times. The Trial Examiner found that Finlayson was not engaging in surveillance as alleged in the complaint, but that he drove by while engaged in making business calls, and then drove by again several times to "satisfy an aroused curiosity." Even if Finlayson originally drove past where this group was meeting "to satisfy an aroused curiosity," in view of the number of times he drove by and the persistence with which he followed the Union representative's car, we find that he was thereby engaging in surveillance of union activities, in violation of Section 8(a)(1) of the Act.

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[2] Angwell Curtain Co. v. N.L.R.B., 192 F. 2d 899, 903 (C.A. 7); N.L.R.B. v. Abbott Worsted Mills, 127 F. 2d 438 440, (C.A. 1); N.L.R.B. v. Entwistle Mfg. Co., 120 F. 2d 532, 535-536 (C.A. 4). Accord: Bituminous Material & Supply Co. v. N.L.R.B., 281 F. 2d 365, 371 (C.A. 6).

3. Supervisor Kondzer admitted telling employees that "if the Union gets in the Company has to fold up, we'll all be without a job." The Trial Examiner found that Kondzer's remarks were merely expressions of his own feelings made in "a friendly context." On the record as a whole, however, we find the remarks were coercive and, therefore, that the Respondent thereby further violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully laid off Loretta May Hall and James Ralph Clark on September 7, 1961, and thereby violated Section 8(a)(3) and (1) of the Act, we shall order that the Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, by payment to each of them a sum of money equal to the amount he or she would have earned from the date of the discrimination to the date of the offer of reinstatement,[3] less net earnings during said periods to be computed on a quarterly basis in the manner established by the Board in F. W. Woolworth Company, 90 NLRB 289, and shall include the payment of interest at the rate of 6 percent to be computed in the manner set forth in Isis Plumbing Co., Inc., 138 NLRB No. 97. We shall also order that the Respondent preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payments records and reports, timecards, and all other records necessary to analyze the amounts of back pay due.

[3] See A.P.W. Products Co., 137 N.L.R.B. No. 7.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the joint Respondent, Tru-Line Metals Products Company and Tru-Line Screw Products, Incorporated, Detroit, Michigan, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local 408, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, ALF-CIO, or any other labor organization of its employees, by discriminatorily laying off any of its employees because of their union membership or activities, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

(b) Engaging in surveillance of union activities, making coercive remarks, or in any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of said Act, and to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Loretta May Hall and Ralph James Clark immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a

result of the discrimination against them, in the manner and to the extent set forth above in the section entitled "The Remedy".

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records and reports, timecards, and all other records necessary to compute the amount of back pay due under the terms of this Order.

(c) Post at both plants in Detroit, Michigan, copies of the notice attached hereto marked "Appendix".[1] Copies of said notice, to be furnished by the Regional Director for the Seventh Region, shall, after being duly signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof, and be maintained for a period of 60 consecutive days after posting, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Seventh Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C., September 26, 1962.

Frank W. McCulloch, Chairman
Gerald A. Brown, Member
National Labor Relations Board

(Seal)

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[1] In the event that this order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals Enforcing an Order."

Boyd, Leedom, Member, dissenting:

I do not agree that the evidence establishes the commission of unfair labor practices by the Respondent, and would, like the Trial Examiner, dismiss the complaint.

The majority finds that Clark and Hall were laid off because of their union activities. There is, however, no evidence that the Respondent had knowledge that they were engaging in such activities. Reed, an employee, told Finlayson, president of the Respondent, of his part in bringing the Union into the plant. He denied, however, that he told Finlayson about the activities of Clark and Hall, and the Trial Examiner credited his denial. The majority places considerable reliance, in finding knowledge by the Respondent, on the small size of the operations. Clark, however, spoke to employees about the Union only during nonworking hours and off the plant premises. While Hall spoke to the female employees in the plant about the Union, she did so only in the ladies' rest room, and there were no female supervisors. It is clear, therefore, that Clark and Hall did not carry on their activities "in such a manner or at times that in the normal course of events Respondent must have noticed them."[5]

Nor do I agree with the weight which my colleagues attach to Clark's remark to supervisor Kondzer that "we get a union here things will be different." It was made several months before the advent of the Union, and hardly establishes Clark's intent to play a leading part in organizing a union.

Furthermore, I find no evidence in this record of union animus by the Respondent. The majority points to only one remark, by supervisor Kondzer, that "if the union gets in the company has to fold up, we'll all be out of a job." This remark, which Kondzer admitted, was made after the layoff of Clark and Hall, in a conversation in which employees expressed the opinion that the Respondent, if or-

[5] Hadley Manufacturing Corporation, 108 NLRB 1641, 1650; see also Diamond Ginger Ale, Incorporated, 125 NLRB 1174, 1177.

ganized, could not compete on a competitive level with "all the small alley shops in the city," and in which Kondzer was merely indicating agreement with these opinions. Like the Trial Examiner, I would not find a violation of Section 8(a)(1) on this basis.

I likewise disagree with the majority's finding that Finlayson, about a week after the layoff of Clark and Hall, engaged in unlawful surveillance of a meeting, on the street near the plant, of the union organizer with Clark and Hall. As the Trial Examiner found, Finlayson drove in and out of the plant frequently on business calls in the immediate area of the plant, he noticed the individuals involved near the plant, and, "solely to satisfy an aroused curiosity as to their presence in the vicinity, he drove around the several-block area for several minutes. * * *" In my opinion, this chance encounter hardly establishes unlawful surveillance of union activities.

The Trial Examiner pointed out in the Intermediate Report that there are a number of suspicious circumstances in this case. I agree. But suspicious circumstances do not satisfy the General Counsel's duty to establish the commission of unfair labor practices by a preponderance of the evidence.

Dated, Washington, D.C. September 26, 1962.

Boyd Leedom, Member
National Labor Relations Board

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership by any of our employees in LOCAL 408, INTERNATIONAL

UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, or any other labor organization of our employees, by discriminatorily laying off any of our employees or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT engage in surveillance of union activities, make coercive remarks, or in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self organization, to join, or assist the above-named labor organization or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the National Labor Relations Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL offer to LORETTA MAY HALL and RALPH JAMES CLARK immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their respective seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them.

All our employees are free to become or remain and to refrain from becoming or remaining, members of the above-named or any other labor organization.

TRU-LINE METAL PRODUCTS COMPANY
TRU-LINE SCREW PRODUCTS, INCORPORATED

(Employer)

Dated ..... By .....
(Representative) (Title)

NOTE: We will notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 501 Book Building, 1249 Washington Boulevard, Detroit 26, Michigan (Tel. No. WOodward 3-9330), if they have any questions concerning this Notice or compliance with its provisions.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Upon a charge and an amended charge filed on September 13 and November 15, 1961, respectively, by Ralph James Clark, an individual, and a charge filed on November 15, 1961, by Loretta May Hall, an individual, the General Counsel for the National Labor Relations Board issued a complaint on November 17, 1961, against True-Line Metal Products Company, hereinafter referred to as Tru-Line Metal, and Tru-Line Screw Products, Incorporated, hereinafter referred to as Tru-Line Screw, as joint Respondent, alleging violations of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended (61 Stat. 136), hereinafter referred to as the Act. The Respondent thereafter filed an answer to the complaint denying the commission of any unfair labor practices.

On January 16 and 17, 1962, pursuant to notice, a hearing was held in Detroit, Michigan before Wellington A. Gillis, Trial Examiner, at which all parties were represented by counsel. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to in-

troduce evidence pertinent to the issues, and to submit argument. Timely briefs were subsequently filed by counsel for the General Counsel and the Respondent.

Upon the entire record in this case,[1] and from my observation of the witnesses and their demeanor on the witness stand, and upon substantial, reliable evidence "considered along with the consistency and inherent probability of testimony" (Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 496), I make the following:

FINDINGS AND CONCLUSIONS[2]

I. The business of the Joint Respondent

Tru-Line Metal Products Company and Tru-Line Screw Products, Inc., are Michigan corporations with their common office and place of business located at 19176 Glendale, Detroit, Michigan. During the calendar year 1960, Tru-Line Metal, which is engaged in the manufacture, sale, and distribution of metal stampings and lubricating devices, manufactured, sold and distributed products valued in excess of $600,000, of which products valued in excess of $400,000 were shipped from its plant directly to States other than the State of Michigan, and purchased materials valued in excess of $300,000, of which amount in excess of $5,000 was directly transported to its plant from points outside the State of Michigan. During the same period, Tru-Line Screw, which is engaged in the manufacture, sale, and distribution of screw machine parts, purchased and transported to its plant, materials valued in excess of $100,000, which were transported directly from suppliers located in States other than the State of Michigan, and

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[1] Motions made without objection at the start of the hearing by counsel for the General Counsel and the Respondent, respectively, to amend and correct portions of the complaint and to amend the answer, as set forth in the record, were granted by the undersigned.

[2] To the extent that the record discloses any testimony at variance with these findings, it is regarded as being of insufficient weight to be controlling or unworthy of belief.

manufactured products valued in excess of $300,000, all of which were delivered to Tru-Line Metal at their common plant. I find that each company is engaged in commerce within the meaning of Section 2(6) of the Act.

Concerning the operations of both companies, additional facts, most of which were stipulated, disclose that Norman D. Finlayson and Ben H. Burton, president and secretary-treasurer, respectively, of both companies, and the only officers of both companies, constitute a majority of the board of directors of both companies, and, together own all of the stock of Tru-Line Screw and two thirds of the stock of Tru-Line Metal, the remaining one-third belonging to Claude Wolcott, foreman at Tru-Line Metal. Except for a relatively small amount of space leased by Tru-Line Screw in the Bayley Products plant located directly across the street from their plant, the operations of Tru-Line Screw and of Tru-Line Metal are confined to the rear and front portions, respectively, of their common plant at 19176 Glendale, where both companies use the same office and clerical staff and the same shipping and receiving area. Although each company has its own employee production complement, there appears to be some employee interchange and Finlayson supervises all aspects of the operations of both companies.

Accordingly, notwithstanding the fact that each company is a separate legal entity, I find, under these circumstances, including the integrated nature of their operations, the common control and ownership centered in Finlayson and Burton, that Tru-Line Metal and Tru-Line Screw constitute a single employer within the meaning of the Act, and, having been charged as joint Respondent, both companies are jointly liable and responsible for remedying any conduct herein found to constitute unfair labor practices under the Act.[1]

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[1] See Lykes Bros. Inc. of Georgia 128 NLRB 606, 612; Dearborn Oil and Gas Corporation, 125 NLRB 645, 647, citing N.L.R.B. v. Somerset Classics Inc., et al., 193 F. 2d 613 (C.A. 2), enfd. 90 NLRB 1676; and N.L.R.B. v. Federal Engineering Company, Inc., 153 F. 2d 233 (C.A. 6). See also Esgro Inc. and Esgro Valley Inc., 135 NLRB No. 20; and Cone Brothers Contracting Company, 135 NLRB No. 18.

II. The labor organization involved

Local 408, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The alleged unfair labor practices

The Issues

1. Whether, between September 1 and 14, 1961, the Joint Respondent engaged in certain specified acts of interrogation, threats, promises of benefit, and surveillance in violation of Section 8(a) (1) of the Act.

2. Whether, in terminating the employment of Loretta May Hall and Ralph James Clark on September 7, 1961, and thereafter failing to reinstate said employees, the Joint Respondent was discriminatorily motivated, thereby violating Section 8(a)(3) of the Act.

A. Section 8(a) (1) allegations

During the 3-week period commencing about the last of August 1961, the Union, through the efforts of three employees, was engaged in an apparently unsuccessful attempt to organize the employees of the Joint Respondent. At that time, as reflected by Joint Exhibit No. 1, it appears that the employee complement of the Joint Respondent consisted of approximately 7 male employees employed on two shifts at Tru-Line Screw and 29 employees, all but 5 of whom were women, employed on three shifts at Tru-Line Metal. The union activity, as far as the record discloses, was for the most part confined to the distribution, signing, and return of authorization cards around the first part of September and an attempt by union adherents to intercept employees between shifts a block and one-half from the plant on September 13. As testified to by Ralph Clark, one of the two alleged discriminatees whose employment was terminated on September 7, "most of all (sic) the union proceedings took place off company property and not on

company time," and, with the exception of the activity of Loretta Hall, the other alleged discriminatee, in talking to, and distributing cards among, the day shift girls in the ladies' restroom, there is little evidence of union activity on plant premises.

As violative of Section 8(a)(1) of the Act, the complaint alleges that during this period the following incidents occurred:

> (1) On or about September 1 and 14, 1961, Joint Respondent, through its supervisor and agent, John Kondzer, warned and threatened employees that the shop would be closed and with other reprisals if they would not refrain from becoming or remaining members of the union or giving any assistance or support to it.
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> (2) On or about September 6, 1961, Joint Respondent, by its supervisor and agent, Norman D. Finlayson, interrogated an employee concerning the union membership activities and desires of the employees; attempted to get said employee to turn over union authorization cards to Joint Respondent; and promised said employee economic and other benefits if said employee refrained from becoming or remaining a member of the union or from giving any assistance or support to it.
>
> (3) On or about September 1, 1961, Joint Respondent by its supervisor and agent, Claude Wolcott, interrogated employees regarding their union membership and activities.
>
> (4) On or about September 13, 1961, Joint Respondent through its supervisor and agent, Norman D. Finlayson, kept under surveillance the union meeting places and activities of its employees.

As to (1) above, according to Warren Fairbanks, a Tru-Line Screw employee, about a week or 10 days before the September 7 layoff of Clark and Hall, John Kondzer, an admitted supervisor, told him at noon that "the union in a

small shop wouldn't work because you'd have to close up the shop," with which sentiment Fairbanks expressed his concurrence. Later that same day, in a conversation with Kondzer and Ted Le Mieux,[4] according to Fairbanks, "Ted and John were telling me that the only way you could make a union pay in a small shop was to unionize all the small alley shops in the city in order to keep a competitive level the same." Fairbanks also testified that, during a lunch hour one week after the September 7 layoffs, after he had been observed by Kondzer that morning talking with Clark who had given him a ride to work, Kondzer asked Fairbanks if he were not afraid that he would get into trouble for associating with Clark.

Kondzer, who credibly denied having had any conversation with Fairbanks relating to union matters prior to the September 7 layoffs, (a) credibly denied making the statement attributed to him by Fairbanks concerning the latter's association with Clark; (b) corroborated in substance Fairbanks' testimony relating to the three-way conversation with Le Mieux, Fairbanks, and himself, but testified that this took place after September 7, that Le Mieux made the statement and that he (Kondzer) merely expressed agreement with it; and (c) admitted stating to Fairbanks after the layoff that, "well, if the Union gets in the Company has to fold up, we'll all be without a job."

Based upon the above testimony generally it would appear that on two occasions brief discussion took place concerning the feasibility of a union in a small shop and that, to the extent that Kondzer entered into the conversations, he merely expressed his own sentiments on the matter, which, in fact, were in accord with those expressed by employees Fairbanks and Le Mieux. Considering the friendly context in which these two brief discussions occurred and the fact that it appears that Fairbanks and Kondzer on one occasion, and Fairbanks, Le Mieux, and

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[4] Le Mieux was described by Fairbanks as an operator on the afternoon shift. Although Joint Exhibit No. 1 classifies Le Mieux as a "Foreman-Set up & Operator," there is neither an allegation nor any evidence that Le Mieux is a supervisor within the meaning of the Act.

Kondzer on the other, were expressing similar views as to the economic effect that the Union might have in their small shop, I am of the opinion that, under these circumstances, such statements by Kondzer fall far short of substantiating the complaint allegation cited above and do not constitute interference, restraint, or coercion within the meaning of Section 8(a)(1) of the Act.

As to (2) above, Norman Reed, who signed a union card on or about September 1, testified that on that day or the day following he told Finlayson, apparently voluntarily, that he had signed a card, to which he received no response. Reed further testified that 2 or 3 days prior to the September 7 layoff, Finlayson told him "to stay away from Bayley Products at all times," and, when asked by counsel for the General Counsel whether Finlayson indicated why he should stay away from Bayley Products, Reed answered, "on account of union activities." Then, on September 6, while he was working overtime at the Bayley Products location, Finlayson approached him and wanted to know what the trouble was, and, according to Reed, "we started getting to the trouble and I told him, he said I was a troublemaker, and I told him if I was a troublemaker I was the one who started the trouble in the shop about the Union." Reed, whose further testimony as to the substance of this conversation is no less than confusing, testified that Finlayson "wanted me to get the union cards back and stop passing out union cards," to which Reed replied that he would try to comply.

Finlayson denied the complaint allegations attributed to him and, as to the Bayley Products' conversation, testified that, because it was apparent to him that something was troubling Reed, he asked Reed on or about September 6 what was the matter, to which Reed replied that "you're not using us fellows right" and that he was being worked too hard. After a further exchange concerning the availability of help if Reed needed it and Reed's expressed desire to work alone, Reed told Finlayson that he belonged to the Union and that the Company could not fire him. When Finlayson stated that he was not talking about the

Union and that he had had trouble with Reed not getting along with fellow employees, Reed parried with an admission that he was passing out union cards on his own time, to which Finlayson concluded the conversation by replying that he was not interested in hearing anything about that.

Reed, like Clark and Hall, was active in support of the Union, but, unlike Clark and Hall, was not laid off on September 7. In part, the explanation as impliedly asserted by General Counsel for the fact that Reed's employment tenure was not also affected is that Reed was converted, or at least so the Respondent believed (from his active leadership in the union effort) to that of a loyal employee whose interests coincided with the Respondent's alleged antiunion sentiments, as evidenced by Reed's testimony as to the September 6 conversation with Finlayson.[5] If, however, Finlayson, in his conversation with Reed, had in fact expressed his interest in curtailing union activity in the plant, as testified to by Reed, and had impliedly assured Reed of continued employment by securing from Reed his agreement to get the union cards back and to refrain from further union activity in this regard, it would seem logical to assume, contrary to the fact, that Finlayson would have made subsequent inquiry of Reed on the matter. There is no evidence, including any testimony by Reed, that such is the case or that the Union was ever again the subject of conversation between Finlayson and Reed. Also, had Finlayson in fact demanded of Reed that he stay away from Bayley Products at all times on account of union activities, as testified to by Reed, it would seem strange that Finlayson did not admonish Reed for refusing to follow his directive in this regard when, a day or two later on September 6, he approached Reed at the Bayley Products location.

For the above reasons and based upon my observation of Reed and his demeanor on the witness stand, I am inclined

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[5] In fact, contrary to the assertion set forth by counsel for the General Counsel in his brief that Finlayson successfully got Reed to cease his union activity, Reed's own testimony indicates that he subsequently attended a union meeting on a Friday, either September 15 or 22, 1961.

to credit Finlayson's version of the conversation, and to discredit Reed's testimony to the extent that it attributes to Finlayson a directive that Reed stay away from Bayley Products on account of union activities and an expressed desire that Reed get the union cards back. In view of my finding that Finlayson engaged in no interrogation of Reed, contrary to the General Counsel's assertion as to promises of benefit I am of the opinion that no unlawful inference as to an ulterior motive should be drawn from the fact that Reed, according to his unrefuted testimony, asked Finlayson during the September 6 conversation for a raise in pay and for a vacation and, in reply, was told as to the former that the job did not pay that kind of money, and, as to the latter that he could have one the following week,[6] even when coupled with the fact that shortly thereafter Reed accepted an extra part-time job at Berkly Tool Company which he allegedly obtained through the efforts of Ben H. Burton, one of Respondent's officials.

As to (3) above, Anna Ardanowski testified that Claude Wolcott, a supervisor, once asked her whether she had heard anything about the Union, to which she replied in the negative. In view of the fact that Ardanowski was totally unable to recall when this conversation took place, even after repeated attempts by counsel for the General Counsel to elicit such information and after she had been given the opportunity to refresh her recollection by reading her affidavit, coupled with Wolcott's credited denial that he ever talked to any employee concerning union activities, I find that the General Counsel has failed in his burden of proof as to this allegation.

As to (4) above, Bocks testified that, pursuant to an agreement whereby he would meet Clark, Hall, and Miller of Bayley Products, on the corner of Westwood and Glendale streets at 3 p.m. on September 13 for the purpose of talking with employees between shifts, he arrived at 2:45 p.m. and, while waiting for Clark and Hall to arrive, parked

[6] In another part of his direct testimony Reed testified that Finlayson's reply was that he could have it the following year.

his car at the designated corner.[7] After having been there for almost 10 minutes, Finlayson backed out of the Tru-Line driveway and "proceeded toward me, at which point Bocks started his car and drove around the block three or four times, with Finlayson following him. Finally, when Bocks noticed that Finlayson was no longer in sight, Bocks again parked at the prearranged corner, where he found Clark and Hall waiting for him in the former's car. After telling Clark and Hall that, because Finlayson was driving around the neighborhood, they should move on and meet him later, Bocks went down to Bayley Products, met Miller, then told her to wait for him at the corner of Westwood and Glendale while he went to find Clark and Hall. Having located the latters' parked car, Bocks noticed Finlayson driving "out of one of the driveways of a plant," and, after telling Clark and Hall to follow him, Bocks drove around several blocks with Finlayson, who had pulled in behind him, following. Finally, with Finlayson still behind him, Bocks returned to Westwood and Glendale where he told Clark and Hall, who, contrary to his instructions, had not followed him, to park their car and get in his. After parking Clark's car, Clark and Hall got in Bocks' car and the three of them then drove back to the corner of Westwood and Glendale, picked up Miller, who had been waiting for them, and proceeded to drive around a few more blocks before parking their car at Davison and Westwood, where they sat and talked, during which time Finlayson "drove by several times watching us." Miller then got out of the car and "waved some of the people down and talked to them." Finlayson drove by several more times before going back to the Tru-Line plant. Finally, having decided

[7] Necessary to an understanding of the testimony relating to the alleged ambulatory surveillance incident, the undisputed testimony as well as Joint Exhibit No. 2 discloses that the Tru-Line plant is located on the north side of Glendale Avenue; that Glendale Avenue is a dead-end street with three streets running north from it, Auburn at the extreme west Artesian at the extreme east, and Westwood, approximately in the middle but to the west of the Tru-Line plant; and that one block north of, and running parallel to, Glendale is Davison, which, like Glendale, is a dead-end street running between Auburn and Artesian.

that they were not going to be able to talk to many people, they drove away.

The testimony of Clark on the one hand, and that of Hall on the other, although in part corroborative of Bocks', varies in many particulars from the version supplied by Bocks. Thus, Clark and Hall both testified that the pre-arranged meeting place was Westwood and Davison streets (rather than Westwood and Glendale); Clark testified that, upon arriving at Westwood and Davison, he saw Bocks' car parked at Westwood and Glendale, and therefore drove down to meet him at that corner, whereas Bocks testified that, after having circled the block a few times, Clark and Hall were already waiting for him at Westwood and Glendale when he returned; Clark testified that upon making an initial contact with Bocks at Westwood and Glendale, Bocks told him that Finlayson had been driving around the area and that he should pull around the corner, park, and get into Bocks' car, whereas Bocks and Hall testified that Bocks told Clark and Hall to move on and to meet him later because Finlayson had been following him; Clark testified that the four of them (Clark, Hall, Miller and Bocks), finally got into one car (belonging to Bocks) at Davison and Auburn, and thereafter proceeded to the final location at Westwood and Davison, whereas Bocks testified that it was at Westwood and Glendale that the four of them were first together in Bocks' car; and, as to testimony on behalf of the General Counsel which would indicate the extent to which Finlayson could have observed any contact between his shift employees and the principals allegedly under surveillance, Bocks testified that, at the final meeting place at Westwood and Davison, Miller "waved some of the people down and talked to them," whereas Clark testified that Miller "approached one of the cars."[8]

[8] Because of a typographical error in the transcription of Hall's testimony, namely, "And Matti Miller got out of the car to talk to mene (sic) of the girlsl (sic) going to work on the shift at Tru-Line," Hall's

(Continued on next page)

While, as above indicated, the combined testimony of Bocks, Clark, and Hall is confusing, in many respects conflicting, and, in my opinion, cannot be completely relied upon as reflecting the true facts,[9] neither am I persuaded that the sketchy testimony of Finlayson on this matter reflects the actual happenings on this afternoon. Finlayson, who credibly testified that because of the inaccessibility and boxed-in location of the plant (only three streets leading from Glendale Avenue) and because Tru-Line deals with a number of different companies in the immediate area, his normal functions require that he be in and out of the plant a great deal using the same streets,[10] also testified that on the day in question he saw Clark, Hall, Miller, and Bocks parked at the corner of Westwood and Glendale. Confronted with the specific surveillance allegations, Finlayson testified that "all I can say is that I'm going around in there and it could be said that I'm following people or passing"; and, when asked by counsel for the Respondent whether he at any time followed them, Finlayson testified that, "I could have been going in the same direction, but in thought I was not following anybody. There was no point in me following anyone."

(Continued from preceding page)

testimony contributes little to a factual resolution of this issue. Upon all of the testimony, I find that Miller waved down one car in which several girl employees were riding and that the ensuing conversation was of short duration. Notwithstanding corroborating testimony indicating that Finlayson drove past this intersection several times, in the absence of any testimony that he was driving by at this precise moment or that he witnessed this brief contact with a few of his employees, I find that he did not see this occurrence.

[9] As Matti Miller was not called as a witness her version of what happened is not known. Clark did not impress me as being completely reliable in his testimony generally, contradicting himself at least on one occasion, and not infrequently supplying evasive and meaningless answers such as "that cannot be distinguished," "that can't be distinguished at this time," and "that point is to be disputed."

[10] Corroborative of Finlayson in this regard is the testimony of Clark who testified that it is well known in the plant that Finlayson, as part of his functions in running the plant, frequently comes and goes during the course of certain days, using his car for various reasons including the buying of parts and machines.

Based upon the record as a whole, I am persuaded and so find that Finlayson, on the afternoon in question, left the plant to make business calls in the immediate area;[11] that, while so engaged, by mere chance noticed one or more of the cars as well as the people involved;[12] that, at this point, solely to satisfy an aroused curiosity as to their presence in the vicinity, he drove around the several-block area for several minutes for this purpose; and that at no time during the period in question did Finlayson witness any contact between any of his employees and the occupants of the parked car. These facts by themselves do not, in my opinion, constitute substantial evidence that Finlayson was engaged in unlawful surveillance of union meeting places and activities as alleged in the complaint.[13]

Thus, in a fact situation not in many respects materially unlike that under consideration, where the president of a small company, after having accidentally stumbled upon a union meeting at an employee's home and impelled by curiosity, drove back and forth five or six times, the court held that, absent evidence of previous union hostility or planned espionage, "an isolated instance of observation merely to find out what was going on without something to indicate that the information sought to be obtained was to

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[11] Bocks testified that at one point during this period he observed Finlayson leaving a driveway of a plant, and both Clark and Hall testified that Finlayson was seen leaving the Olds Plating Company lot.

[12] In an apparent attempt to establish by inference that Finlayson on the afternoon in question had received prior notice that Bocks was parked in the area just prior to 3 p.m., Bocks testified that while waiting for the others to arrive at the corner of Westwood and Glendale a few minutes before Bocks first saw Finlayson, he saw a white 1959 Ford leave the Tru-Line plant, and that he believed that it belonged to "someone from Tru-Line Products, a supervisor, but I'm not sure." Notwithstanding counsel for General Counsel's efforts on cross-examination of Respondent's witnesses, the record contains no evidence to establish that the car belonged to an official of the Respondent or that the person driving it observed Bocks. Accordingly, I find that such an inference is totally unwarranted and that Finlayson subsequently happened upon the union adherents by coincidence and not by design.

[13] C. R. Graybeal & Sons, 114 NLRB 700, 705; Empire Pencil Company, 86 NLRB 1187, 1214.

be used to the disadvantage of the employees, or that the conduct was, in view of all surrounding circumstances, such that the employees might reasonably assume the observation would result to their detriment, there could be no restraint, and hence no unlawful surveillance."[14]

For the reasons above set forth, and upon the record as a whole, I find that the General Counsel has not established by a preponderance of the evidence that, on this occasion, Finlayson was engaged in unlawful surveillance,[15] or that the Respondent otherwise engaged in conduct violative of Section 8(a)(1) of the Act.

B. Section 8(a)(3) allegations

Toward the latter part of August 1961, Norman Reed, one of approximately seven employees then employed by Tru-Line Screw, solicited the assistance of Ralph Clark, a fellow employee and one of the two alleged discriminatees, in an effort to organize the employees of the Respondent's plant. Thereafter, Virgil Bocks, president of the Union, was contacted and, through Matti Miller, chief steward at Bayley Products Company, union authorization cards were transferred to Reed, who, after signing one, turned them over to Clark. Clark then proceeded to discuss the Union with a number of employees and, on August 29, asked Loretta Hall, an employee of Tru-Line Metal and the other alleged discriminatee, to sign a card, which she did on August 30. Pursuant to her agreement with Clark that she would talk to the women employees about the Union, sometime between September 1 and 3, Hall received union cards from Clark. Thereafter, in addition to talking with the girls employed on the afternoon shift, of whom there were 7, Hall met with all but 2 or 3 of the 14 day shift girls in the ladies restroom, and, after discussing the Union, distributed among them union cards which were signed and subsequently returned to her. Hall then turned them over to Clark.

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[14] N.L.R.B. v. Falls City Creamery Company, 207 F. 2d 820 (C.A. 8).

[15] See Columbus Marble Works, 111 NLRB 1162, 1163.

On September 7, 1961, at about 3:30 p.m., Clark, who had been employed since February 1959 as a chip operator and laborer engaged primarily in washing parts, was approached by Finlayson, handed two checks, and told that he was being laid off due to the lack of work in his department. Similarly, on this date, at the close of the day shift, Hall, who had been employed since August 1959 performing various machine operations, was handed two checks by her supervisor, Wolcott, and told that he had to lay her off because of lack of work.

The General Counsel contends that Clark and Hall were terminated from the Respondent's employ because of their activities on behalf of the Union. The Respondent denies having prior knowledge of union activity by Clark and Hall, and asserts that they were laid off solely because of lack of work.

Because the Respondent offered little evidence to support its position that lack of work necessitated the two layoffs, and, in the case of Hall, no explanation as to its basis for her selection, the controlling issue presented for resolution is whether, on the whole record, the General Counsel has established a prima facie case of discrimination as to either or both of the alleged discriminatees.[16] As it is well settled that an employer may discharge an employee for any reason, or for no reason, as long as it is not one proscribed by the Act,[17] necessary to a determination that a prima facie case of discrimination has been established is a finding that the Respondent was unlawfully motivated in terminating the employment of Clark

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[16] In assuming its burden of proof by a preponderance of evidence as to the complaint allegations, which burden remains with the General Counsel throughout, it is only after the General Counsel has made out a prima facie case that the burden of going forward with the evidence shifts to the Respondent, requiring the Respondent to produce evidence to rebut that proffered by the General Counsel. See American Dredging Company, 123 NLRB 139, 142.

[17] N.L.R.B. v. Standard Coil Products Co., Inc., 224 F. 2d 465, 470. (C.A. 1).

and Hall. Essential to a finding of unlawful motivation is the existence of evidence disclosing that the Respondent knew that the alleged discriminatees were members of the Union or were engaged in activities on its behalf. The record contains no evidence, nor does the General Counsel assert that such exists, that the Respondent or any of its supervisors, prior to the September 7 layoffs, possessed direct knowledge of the union activities in which either Clark or Hall had engaged. However, as the Board has held that evidence of direct knowledge of an employee's union activities is not a sine qua non for finding that he has been discharged because of such activities, and that direct knowledge may be inferred from the record as a whole,[18] the question of whether the General Counsel has made out a prima facie case of discrimination as to Clark and Hall turns on a determination of whether, upon the record as a whole, there is sufficient evidence to warrant, and in fact to require, an inference that the Respondent possessed direct knowledge of their union activities prior to their separation.

Before turning to the evidence bearing upon this issue, to say that the circumstances surrounding the termination of Clark and Hall are highly suspicious would be an understatement. Thus, lending itself to this proposition is the fact that (a) the Respondent was aware of union activity among its employees; (b) apart from Reed, employees Clark and Hall were the leaders in the union movement, and, between them, apparently at one time or another, most of the employees were contacted; (c) both Clark and Hall were separated simultaneously not too long after the union activity commenced, and without advance notice; (d) Hall was capable of performing most of the jobs in the plant and neither she nor Clark were at the bottom of their respective seniority lists; (e) there had been no plant layoffs for a long time and, according to one employee, in the past, slack periods prompted the Respondent

[18] Wiese Plow Welding Co., Inc., 123 NLRB 616 at 618; see Radio Officers' Union of the Commercial Telegraphers Union, AFL v. N.L.R.B., 347 U. S. 17 (1954).

in establishing a "short week" rather than necessitating the reduction of personnel; and (f) testimony by General Counsel witnesses indicated that there appeared to be little or no change in Respondent's overall workload after the September 7 layoffs."[19]

Apart from these factors giving rise to suspicion, actual evidence upon which an inference of employer knowledge might be drawn is confined to the fact that the employee complement of Joint Respondent's plant is small; testimony by Kondzer that on one occasion some 3 or 4 months before the period in question he heard Clark say "we get a union here things will be different"; and Bocks' testimony that he had met Reed, Clark and Hall "around the plant" for the purpose of discussing employee organization.

Tending to either minimize or negate the affirmative effect of the above factors upon the issue of imputing to the Respondent knowledge of the union activities of Clark and Hall, cognizance must be taken of the fact that (a) the record contains no credible evidence disclosing union animus, or hostility or even opposition to the Union by the Respondent; (b) other than Hall's testimony relating to the discussion and card distribution among some women employees in the ladies' restroom and Bocks' testimony that he had met with Reed, Clark and Hall "around the plant," there is no evidence of specific union activity on plant premises generally, no evidence that Clark or Hall engaged in union activity on plant property, no evidence that either one openly espoused the union cause, and the record thus bears out Clark's testimony that most of the

[19] As to (c), (d) and (e), however there is no evidence that, in the past, the Respondent had followed a practice of giving advance notice or using a seniority list in effectuating layoffs, or that the Respondent considered the instant situation a slack period. As to (f), the record discloses that no employees have since been hired by Tru-Line Metal, and, with the exception of a screw machine operator, Peterson, who had left Respondent's employ in August and was reemployed by Tru-Line Screw for a 3-week period in November, and a second screw machine operator, Smith, who was hired by Tru-Line Screw in January, 1962, no employees have since been added to the employee complement of Tru-Line Screw.

union proceedings took place off company property and not on company time;[20] (c) even assuming the existence here of union discussion generally among the employees which normally occurs during periods of union activity, and being completely aware of the small size of the Respondent's plant, the record contains no testimony by Clark or Hall or, with one exception, by any witness which would indicate that either of the discriminatees was at any time prior to his separation observed by management officials talking with Bocks or discussing the Union with other employees;[21] (d) even the testimony of Reed, who told Finlayson on September 6 that he had passed out union cards and, therefore, is the one employee from whom the Respondent might have learned of the union activities of Clark or Hall, does not indicate that Finlayson either asked for, or was supplied with, the names of union adherents or the identity of employees to whom cards were distributed; and (e) Reed, who voluntarily informed Finlayson that he had signed a union card and that he had been primarily responsible for initiating the union activity in the plant, not only was not terminated but in fact was assigned certain work functions formerly performed by Clark.

With recognition that suspicion or conjecture is no substitute for proof and is insufficient upon which to predicate an unfair labor practice finding,[22] or to impute to an em-

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[20] As to the restroom incident, it does not appear that any of Respondent's officials were aware of this activity or that any supervisor was in a position whereby, in the course of his normal duties, he would have learned of its occurrence.

[21] The one exception is Kondzer's testimony that 3 or 4 months before union activity occurred he heard Clark say "we get a union here things will be different." As no other witness testified to this matter and Kondzer was not questioned further on it there is no evidence which would reveal to whom this statement was made or the circumstances under which it was uttered.

[22] Lo-K Foods, Inc., 134 NLRB No. 107.

ployer actual knowledge, the determination to be made is whether, considering all of the above circumstances, the evidence is sufficient to warrant an inference that the Respondent acquired knowledge of the alleged discriminatees' union activities. Having carefully, and at great length, reviewed the credited testimony and all of the evidence pertaining to this issue, I am of the opinion that unless the required knowledge may be inferred from the small size of the Respondent's plant, the inference should not be drawn. While a majority of the present Board has held on a number of occasions that the size of an employer's plant is an important factor to be considered in making such a determination, the Board has also adhered to the proposition that "the mere fact that Respondent's plant is of a small size, does not permit a finding that Respondent had knowledge of the union activities of specific employees, absent supporting evidence that the union activities were carried on in such a manner, or at times that in the normal course of events, Respondent must have noticed him."[23] The instant record, as above documented, fails to supply the necessary supporting evidence required by the Board under its "small plant" doctrine.

Under all of the circumstances, particularly the fact that the record is void of credible evidence reflecting union animus on the part of the Respondent, and in view of the credited denial by Finlayson that he was aware of the union activities of Clark or Hall prior to their separation on September 7, I find the evidence insufficient to warrant the inference that the Respondent possessed direct knowledge of their union activities.[24] Accordingly, as it necessarily follows that, without knowledge of the union activity of Clark or Hall, it cannot be said that the Respondent was unlawfully motivated in terminating their employ-

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[23] Hadley Manufacturing Company, 108 NLRB 1641, 1650; Diamond Ginger Ale, 125 NLRB 1173; S. B. Thomas, Inc., 128 NLRB 1434, 1438-9; Audio Industries, Inc., 135 NLRB No. 102.

[24] See Diamond Ginger Ale, *supra*, and S. B. Thomas, Inc., *supra*; cf. Weise Plow Welding Co., Inc., *supra*.

ment, I find that the General Counsel has failed to make out a prima facie case of discrimination as to the separation of either Clark or Hall.[25]

Notwithstanding the fact that subsequent to their separation the Respondent acquired knowledge of their union activity, in view of my finding above coupled with the fact that the record discloses that no employees other than two skilled operators in Tru-Line Screw have been employed since September 7, 1961, I find that the General Counsel has failed to establish by a preponderance of the evidence that the Respondent has refused to recall or rehire Clark or Hall because of their union activity.

Upon the basis of the foregoing findings of fact and upon the entire record in this case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. Tru-Line Metal Products Company and Tru-Line Screw Products, Incorporated, are, as Joint Respondent, engaged in commerce within the meaning of Section 2(6) of the Act.

2. Local 408, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Joint Respondent has not engaged in any unfair labor practices as alleged in the complaint.[26]

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[25] Hadley Manufacturing Company, *supra*; American Dredging Company, *supra*.

[26] At the close of the hearing I reserved ruling on Joint Respondent's motion to dismiss the complaint. Consistent with my finding and conclusion that no unfair labor practices were committed by the Joint Respondent, said motion is hereby granted.

RECOMMENDED ORDER

It is hereby recommended that the complaint be dismissed in its entirety.

Dated at Washington, D. C.
May 28, 1962.

Wellington A. Gillis,
Trial Examiner.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 884

TRU-LINE METAL PRODUCTS COMPANY AND TRU-LINE SCREW PRODUCTS, INCORPORATED, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 11–13) is reported at 324 F. 2d 614. The Board's Decision and Order (Pet. 14–45) are reported at 138 NLRB 964.

JURISDICTION

The decision of the court of appeals was rendered on November 26, 1963, and the court's decree was entered on the same date (Pet. 2). On February 24, 1964, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including March 5, 1964. The petition was filed on March 2, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that the Company discharged two employees because of their union activities, engaged in surveillance of union activities, and threatened to close the plant if the employees became unionized.

STATUTE INVOLVED

The relevant statutory provisions are set forth at pp. 3–4 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Tru-Line Metal and Tru-Line Screw are commonly owned and controlled corporations occupying the same plant, as well as some additional space rented in a building located across the street (B.A. 4a; 37a–38a).[1] At the time of the events herein, Tru-Line Metal and Tru-Line Screw, together, had 36 employees—24 women and 12 men. All employees were supervised by Norman Finlayson, president of both companies (B.A. 17a, 18a; 37a, 38a, 83a, 98a–99a, 103a, 107a). In August 1961, employee Norman Reed obtained some authorization cards from the Union[2] (B.A. 4a; 53a,

[1] "B.A." references are to the Board's Appendix printed for the use of the court below and filed with the petition.

True-Line Screw produces screw machine parts (B.A. 17a; 101a). Its entire output is purchased by Tru-Line Metal, which manufactures metal products for sale and distribution in interstate commerce (B.A. 17a; 102a–103a). Before the Board, the two firms were treated as a single employer (B.A. 18a); we shall refer to them collectively as the Company.

[2] Local 408, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL–CIO.

55a). Reed signed a card and gave the rest to Ralph Clark who, in turn, gave some to Loretta Hall (B.A. 5a; 56a, 67a, 68a, 77a). Clark asked the Company's male employees to sign cards, and Hall solicited the women. Clark and Hall spoke to most, if not all, the employees, making no attempt to keep their activity secret (B.A. 5a; 77a–78a, 97a–98a).

Shortly after signing the union authorization card, Reed informed President Finlayson that he had joined the Union (B.A. 5a; 84a–85a). Under questioning by Finlayson, he confessed that he "was the one who started the trouble in the shop about the union" (B.A. 5a; 57a, 84a–85a). Shortly thereafter, Reed was given an opportunity to earn extra money from a part-time job secured for him by an official of the Company (B.A. 5a; 58a). The day after Reed's confession, President Finlayson informed Clark that he was laid off "due to lack of work in [his] department" (B.A. 5a; 68a–69a). About the same time, Supervisor Wolcott informed Hall of her layoff "because of lack of work" (B.A. 5a; 78a). The workload had in fact increased at about that time (Pet. 16).

No other employees were laid off at the time of the layoff of Clark and Hall. Both Clark and Hall had more seniority than many other employees, and neither had at any time been reprimanded for unsatisfactory work or conduct (B.A. 5a–6a; 67a, 76a–77a, 98a–99a). Clark had been given a wage increase only a short time before his layoff (B.A. 6a; 67a). Hall

was one of the Company's highest paid and most versatile female employees (B.A. 5a; 76a–77a). After the two employees were laid off, Reed, who had less seniority by a year than Clark, was given Clark's job at an hourly wage 10 cents higher than that which Clark had been paid (B.A. 5a; 51a–52a, 54a–55a, 59a, 61a, 67a, 98a–99a).

A few days after the layoff, Clark and Hall arranged to meet union representatives Bocks and Miller for the purpose of making plans for further union solicitation (B.A. 8; 39, 41). The meeting was scheduled to take place on a street corner near the plant at the time the shifts changed (B.A. 8; 40, 70–71). Bocks arrived early, but, when he observed President Finlayson leaving the plant in his automobile, he drove away. Finlayson followed Bocks for several blocks (B.A. 8; 41). Bocks eluded Finlayson and returned to the appointed meeting place, where he picked up Clark and Hall. Finlayson appeared again and followed as Bocks drove around the plant several times and then parked. Finlayson continued to observe by repeatedly driving past Bocks' car (B.A. 8; 42–43, 72–73, 81–82, 88). After attempting, unsuccessfully, to talk to some of the Company's employees, Bocks and his companions abandoned the effort because of Finlayson's continued surveillance (B.A. 8; 43).

After the layoffs, Superintendent Kondzer told employee Warren Fairbanks that, "if the union gets in, the Company has to fold up, we'll all be without a job" (B.A. 8, 21; 48, 96).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board (one Member dissenting) found that Clark and Hall were laid off because of their role in the union campaign, in violation of Section 8(a)(3) of the Act. Disagreeing with the Trial Examiner who had recommended dismissal of the complaint on the ground that there was no direct evidence of Company knowledge of the employees' union activity, the Board concluded that there was ample other evidence from which Company knowledge could be inferred. (B.A. 6a–8a.) It also found two other violations of Section 8(a)(1) of the Act: President Finlayson's surveillance of the meeting in the vicinity of the Company plant; and Supervisor Kondzer's threat that, "if the union gets in, the Company has to fold up, we'll all be without a job" (B.A. 8a–9a).

The Board's order requires the Company to cease and desist from the unfair labor practices found, and to reinstate with back pay the employees discriminated against (B.A. 10a–11a).

C. THE COURT OF APPEALS DECISION

The court of appeals upheld the Board's findings as supported by substantial evidence and enforced its order in full (Pet. 11–13).

ARGUMENT

Petitioner acknowledges that its basic contention is that there "is not enough substantial evidence on the record considered as a whole" (Pet. 6) to support the Board's unfair labor practice findings. Such an is-

sue rarely warrants review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491. The court of appeals could quite properly sustain the Board even though the Board drew different inferences from the established facts than did the Trial Examiner. *Id.* at 494, 496; *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 363–364.

In any event, the record shows that Hall and Clark were the chief protaganists of the Union; their activities among their fellow employees were extensive and unconcealed; the plant is small with only 36 employees; the two employees were laid off the day following Reed's confession of union activities to President Finlayson; and, while the Company undertook to justify the layoffs upon the ground of lack of work, the workload had in fact increased about that time. In these circumstances, as the court below found (Pet. 12), the Board was fully justified in concluding that the Company knew of the activities of Clark and Hall on behalf of the union and laid them off because of these activities. Similarly, since both President Finlayson's surveillance of the Union organizer and the threat by Supervisor Kondzer occurred at the height of the Union organizing campaign (within a few days following the discriminatory layoff of the two principal organizers, Clark and Hall), it was reasonable for the Board to conclude that these actions tended to interfere with, restrain, and coerce the Company's employees in the exercise of their organizational rights, and thus violated Section 8(a)(1) of the Act.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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